

<b>M.A. Angeliades, Inc. v Bovis Lend Lease LMB, Inc.</b>
201F NY Slip Op H €GF(U)
October 11, 201F
Sup Ct, New York County
Docket Number: 650537/2010
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 650537/2010  
**M. A. ANGELIADES, INC.**  
 vs.  
**BOVIS LEND LEASE LMB, INC.**  
 SEQUENCE NUMBER : 001  
 DISMISS ACTION

PART 3

INDEX NO. 650537/10  
 MOTION DATE 8/8/11  
 MOTION SEQ. NO. 001  
 MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion to ~~for~~ dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
 Answering Affidavits — Exhibits \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 10-11-11

  
**HON. EILEEN BRANSTEN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 3

-----X  
M.A. ANGELIADES, INC.,

Plaintiff,

-against-

Index No. 650537/2010  
Mot. Seq. No.: 001  
Motion Date: 8/8/11

BOVIS LEND LEASE LMB, INC.,  
NEW YORK CITY HOUSING AUTHORITY,

Defendants.

-----X  
**Eileen Bransten, J.:**

Defendant New York City Housing Authority (“NYCHA”) moves for an order, pursuant to CPLR 3211 (a) (7), dismissing the claims asserted against it by plaintiff M.A. Angeliades, Inc. (“MAA”).

**Background**

This action arises out of brickwork and roof replacement work performed by MAA at Wagner Houses, a public housing development located in Manhattan, owned and operated by NYCHA (the “Wagner project”).

Pursuant to a construction management agreement (the “CM Agreement”) executed in 2005, NYCHA hired defendant Bovis Lend Lease LMB, Inc. (“Bovis”) to provide construction management and other services at a variety of public works projects. In 2007, Bovis became the construction manager for all phases of the Wagner project. Bovis’s responsibilities included the solicitation of bids from, and the hiring, supervising, and payment of the project subcontractors. *See* CM Agr., § 7.1.

In 2006, Bovis accepted MAA's bid to perform exterior brickwork repair and related work at 13 buildings on the Wagner project. Bovis hired MAA pursuant to a written contract (the "Trade Contract").

MAA alleges in the complaint that it commenced work on the Wagner project on December 11, 2006, and fully performed its contractual obligations. MAA also alleges that it fully performed all extra work outside the Trade Contract specifications that NYCHA and Bovis directed it to perform. MAA alleges that the extra work required by NYCHA and Bovis prevented it from timely completing its contractual obligations by March 13, 2009, the original completion date, until April 2010, and that the delay caused it to incur additional expenses and costs.

On these allegations, MAA asserts causes of action against NYCHA and Bovis sounding in contract and quasi contract. MAA seeks to recover \$2,327,144.97 in additional compensation due for the extra work that it performed at defendants' direction; \$731,144.00 in delay damages, including increased masonry workforce and overtime masonry work incurred by MAA in complying with defendants' directive to accelerate its work pace; \$1,489,806.03 in costs incurred by MAA as a result of delays caused by defendants that were beyond MAA's control, including extended general conditions costs, extended or increased field and project facilities costs, labor, and materials escalation costs, increased insurance and bonding costs, and home office overhead; \$1,597,065.80 in unpaid contract balances and

retainage; and, in quantum meruit, the value of the labor and materials furnished. MAA also asserts a claim against Bovis under New York State Finance Law § 139-f on allegations that Bovis failed to timely process change orders submitted by MAA for fully performed work.

Bovis, in its answer, denies all allegations of material wrongdoing. Bovis further asserts two counterclaims against MAA and five cross claims against NYCHA based upon contractual and common-law indemnification and contribution.

NYCHA did not serve an answer and now seeks to dismiss all claims asserted against it by MAA, primarily on the ground that no privity of contract exists between itself and MAA.

### **Analysis**

On a motion addressed to the sufficiency of the pleadings, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *see* CPLR 3211 (a) (7). However, “allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence,’ are not presumed to be true and [are not] accorded every favorable inference.” *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dep’t 1999), *aff’d* 94 N.Y.2d 659 (2000), quoting *Kliebert v. McKoan*, 228 A.D.2d 232, 232 (1st Dep’t), *lv. denied* 89 N.Y.2d 802 (1996); *see* CPLR 3211(a)(1).

MAA does not plead, and the documentary evidence does not establish, the existence of a contract between MAA and NYCHA. “It is well established that a subcontractor may not assert a contractual claim against an owner with whom it is not in privity.” *Bubonia Holding Corp. v. Jeckel*, 189 A.D.2d 957, 958 (3d Dep’t 1993); *Perma Pave Contr. Corp. v. Paerdegat Boat & Racquet Club, Inc.*, 156 A.D.2d 550, 551 (2d Dep’t 1989). Inasmuch as no contractual privity exists between MAA and NYCHA, MAA’s contract claims asserted against NYCHA are fatally defective.

Moreover, such claims are also barred by the express terms of the CM Agreement and the Trade Contract. In relevant part, the CM Agreement provides that Bovis “shall require that the Subcontractor or consultant to agree in its subcontract not to make any claims against NYCHA, its officers, agents or employees, by reason of such subcontract or any acts or omission of [Bovis].” CM Agr., § 50.2; *see also* CM Agr., § 10.2.2(g). In conformance with the CM Agreement, the Trade Contract provides that MAA “shall make no claim whatsoever against any officer, agent or employee of [Bovis] and/or NYCHA or any of its Members, officers, employees, agents and representatives, and any other party or entity acting on behalf of NYCHA, for on account of, anything done, or omitted to be done, in connection with this Contract.” Trade Contract, Art. 53. The Special Conditions part of the Trade Contract similarly provides that MAA “hereby agrees not to make any claims against NYCHA, its officers, agents or employees, by reason of such contract or any acts or omissions of [Bovis].” Trade Contract, Special Conditions, Art. 35 (p).

The relevant agreements negate MAA's contentions that it is a third-party beneficiary of the CM Agreement, and has the right to enforce that agreement against NYCHA. Instead, the Trade Contract identifies NYCHA as the Wagner project owner and Bovis as the construction manager. *See* Trade Contract, Suppl. Conditions, §§ 1.5, 1.6. Further, the Trade Contract provides that liquidated damages received under the contract do not constitute a waiver of "NYCHA's right of action against [MAA], as a third-party beneficiary of [MAA's] construction services, which right is hereby expressly acknowledged by the parties to this agreement [Bovis and MAA]." Trade Contract, Art. 16. Where, as here, the subcontractor acknowledges that the project owner is a third-party beneficiary of the contract between the construction manager and the subcontractor, no claim by the subcontractor may lie against the owner. *Accord R.H. Sanbar Projects, Inc. v. Gruzen Partnership*, 148 A.D.2d 316, 319-320 (1st Dep't 1989) (while subcontractors ordinarily lack contractual privity to assert claims against owners, owners, as foreseeable and intended beneficiaries of general contractor-subcontractor agreements, may proceed against subcontractors).

The documentary evidence also negates MAA's allegation that Bovis entered into the Trade Contract as NYCHA's agent. "[W]here a written agreement . . . unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211(a)(1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim." *150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 A.D.3d 1, 5 (1st Dep't 2004).

Neither the CM Agreement nor the Trade Contract includes definitions, terms, or provisions from which it may be inferred that Bovis was acting as NYCHA's agent, rather than as an independent contractor, with regard to MAA. Instead, the CM Agreement sets forth numerous provisions demonstrating Bovis's assumption of significant responsibilities, independent of NYCHA's oversight or involvement. For example, Bovis's responsibilities included construction management, supervision and coordination of all work (*see* CM Agr., § 7.1); payment to MAA (*see id.*, § 10.2.3); oversight over the MAA's means and methods in performing MAA's work (*see id.*, § 11.6.5); review and approval or denial of MAA's requests for extensions of time (*see id.*, § 11.6.9); and determination of the need to undertake default proceedings against MAA. *See id.*, § 11.6.15. Bovis's responsibilities also included establishing bid, performance, payment bond requirements and insurance requirements (*see* CM Agr., § 7.1; Trade Contract, Special Conditions, Arts. 1, 2, 3); directing MAA to increase staffing at the supervisory level (*see* Trade Contract, Special Conditions, Art. 22 [a]); approving deviations from contract documents (*see id.*, Art. 60 [b]); declaring MAA in default under the contract (*see* Trade Contract, Suppl. Conditions, § 6.5); determining MAA's project schedules and coordinating the work (*see id.*, § 13.2); ordering changes in MAA's work (*see id.*, § 19.1); granting extensions of time to MAA (*see* Trade Contract, Art. 13 [A]); and approving MAA's subcontracts. *See id.*, Art. 18.

The Trade Contract provisions providing NYCHA certain rights are not to the contrary, and do not give rise, as a matter of law, to an inference that Bovis was acting

merely as NYCHA's agent, rather than as an independent contractor, when it contracted with MAA. Instead, the cited provisions merely demonstrate NYCHA's intention to ensure that Bovis completed the Wagner project timely and within budget. *See, e.g.*, Trade Contract, Special Conditions, Arts. 8 (Working Hours & Working Days), 10 (NYCHA's Rights), 12 (Approval of Subcontractors), 13 (Prosecution & Progress of the Work), 49 (Final Completion); CM Agr., Art. 33 (NYCHA's Rights).

For example, NYCHA's contractual right to approve all subcontracts into which Bovis entered relating to the Wagner project does not create an agency relationship between NYCHA and Bovis. Public agencies are required by statute to reserve the right to approve the retention of subcontractors by general contractors or construction managers as a means to ensure that responsible contractors and subcontractors are hired to work on projects which are supported by public funds. *John Galt Corp. v. Travelers Cas. & Sur. Co. of Am.*, Sup. Ct., NY County, Apr. 27, 2009, Kornreich, J., index No. 603295/2007, citing State Fin. Law § 138, 89 NY Jur 2d, Public Works & Contracts § 53.

Contrary to MAA's contention, General Conditions, Article 41(d) of the Trade Contract, cannot be interpreted as binding NYCHA to the Trade Contract. MAA cites to a single sentence in a single provision in a multi-page contract which clearly contains a mere scrivener's error. That sentence is "[NYCHA] and [Bovis] are the only parties to this Contract." Trade Contract, General Conditions, Art. 41 (d). Significantly, however, no where else in the multi-part Trade Contract is NYCHA referred to as a contracting party;

instead, the Trade Contract refers to NYCHA solely in its capacity as the Wagner project owner and third-party beneficiary of the Trade Contract. Moreover, the provision further provides that “no subcontract and no approval of any subcontractor shall create or be deemed to create any rights in favor of such subcontractor and against [NYCHA] nor create any contractual relation between any subcontractor or suppliers of material and [NYCHA]) (*id.*; *see also* Trade Contract, Special Conditions, Art. 35 [p] [prohibiting MAA from asserting claims against NYCHA]). Clearly, NYCHA was not intended to be, and is not, a party to the Trade Contract.

For these reasons, the branch of the motion to dismiss the branches of the first, second, third, and fourth causes of action for contractual relief asserted against NYCHA is granted, and these claims are dismissed.

Next, NYCHA next seeks to dismiss the sixth cause of action for quantum meruit relief on the grounds that an express contract governing MAA’s claims for payment exists, and that NYCHA has not assented to such obligation.

This branch of the motion is granted. “The existence of an express agreement, whether oral or written, governing a particular subject matter precludes recovery in quasi contract for events arising out of the same subject matter.” *Morales v. Grand Cru Assoc.*, 305 A.D.2d 647, 647 (2d Dept), *lv. denied* 100 N.Y.2d 510 (2003), citing *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987). The prohibition against quasi-contractual claims in the face of a written contract applies not only to the contracting parties,

but to non-contracting parties, as well. Thus, a “landowner is not liable to a subcontractor for work performed on the owner’s property in furtherance of the subcontract in the absence of an agreement to pay the general contractor’s debt or circumstances giving rise to such an obligation.” *U.S. East Telecommunications, Inc. v. U.S. West Communications Servs.*, 38 F.3d 1289, 1297 (2d Cir. 1994) (applying New York law) (emphasis omitted)]; *Bellino Schwartz Padob Adv. Inc. v. Solaris Mktg. Group, Inc.*, 222 A.D.2d 313, 313 (1st Dep’t 1995); *Perma Pave Contr. Corp. v. Paerdegat Boat & Racquet Club, Inc.*, 156 A.D.2d at 551. “[T]he mere fact that [the owner] has consented to the improvements provided by the subcontractor and accepted their benefit does not render him liable to the subcontractor, whose sole remedy lies against the general contractor.” *Contelmo’s Sand & Gravel, Inc. v. J & J Milano, Inc.*, 96 A.D.2d 1090, 1091 (2d Dep’t 1983); *M. Paladino, Inc. v. J. Lucchese & Son Contr. Corp.*, 247 A.D.2d 515, 515 (2d Dep’t 1998); *Perma Pave Contr. Corp.*, 156 A.D.2d at 551-551.

Here, MAA seeks to recover for labor performed and equipment and materials furnished to Bovis pursuant to the Trade Contract and for acceleration work requiring change orders modifying that contract. The Trade Contract sets forth the details of the relationship between MAA and Bovis, including all conditions and details regarding the work to be performed by MAA at the Wagner project and its payment for such work. Inasmuch as NYCHA is the owner of the project, no quasi-contract claim by MAA, or any other subcontractor on the project, may lie against it.

MAA's contention that NYCHA promised to pay MAA for its additional work on the Wagner project is belied by the documentary evidence on which it is based. While an owner may be held liable to a subcontractor on a quasi contract theory when "it expressly consents to pay for the subcontractor's performance" (*Perma Pave Contr. Corp. v. Paerdegat Boat & Racquet Club, Inc.*, 156 A.D.2d at 551), here, no such promise exists. MAA alleges that NYCHA's promise to pay was communicated to MAA by a letter to its executive vice president, Dimitrios Malakidis, by Bovis project manager Kenneth Outlaw. In the letter, Bovis promises to discuss with NYCHA MAA's "request for NYCHA to have in place a change order allocating funds from which to draw the acceleration costs." Malakidis Aff., Ex. 10, Bovis/MAA Mar. 10, 2009 letter, first paragraph. Bovis also communicates its understanding and belief that NYCHA promised to pay all Wagner project acceleration costs rapidly, and would expedite the processing of MAA's requested change order. However, such communication simply does not constitute a promise by NYCHA to directly pay MAA's invoices in full. By its plain language, the letter does not contain such a promise. Even more significantly, the letter is not written by NYCHA, nor does it include NYCHA's written authorization to Bovis to relay such promise to MAA, or to modify the CM Agreement or the Trade Contract to permit such payment.

For these reasons, that branch of the motion to dismiss the branch of the sixth cause of action for quantum meruit asserted against NYCHA is granted, and that claim is dismissed.

Last, the court notes that the motion is not directed against Bovis or any of Bovis's cross claims for contractual and common-law indemnity and contribution asserted against NYCHA. Therefore, nothing in this decision and order may be construed as a dismissal of those cross claims.

The court has considered MAA's remaining contentions and finds them to be without merit.

### Order

Accordingly, it is

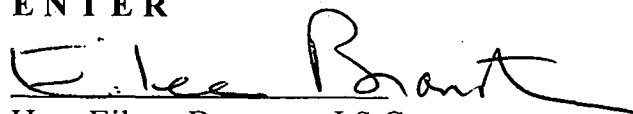
ORDERED that defendant New York City Housing Authority's motion to dismiss is granted in its entirety, and the branches of the first, second, third, fourth, and sixth causes of action asserted against defendant New York City Housing Authority are dismissed; and it is further

ORDERED that the remainder of the action, including all claims against defendant Bovis Lend Lease LMB, Inc. and the cross claims asserted against defendant New York City Housing Authority, are severed and continue; and it is further

ORDERED that counsel are directed to appear for a compliance conference in room 442, 60 Centre Street, on October 25, 2011, at 10 am.

Dated: New York, New York  
October 11, 2010

ENTER

  
Hon. Eileen Bransten, J.S.C.